tion against him assigning or subletting the premises. In my view this right is the determining factor in this case. Whether or not the respondents were aware of the changes in the partnership of the business of the appellants, is an immaterial consideration. The fact of the matter is that the respondents could at no time have prohibited Su from sharing the tenancy of the premises with his partners, and later, assigning it to them altogether before he withdrew from the partnership.

Furthermore, there is no requirement, in my judgment that these changes had to be effected by deed. On this matter, there is an observation by the Privy Council in the *Eng Chuan* case[1] which I reproduce below. Lord Diplock said at p 82:

> ... The transfer of the tenancy from Lee Siew Pan to the personal appellants would *not* have been by way of *assignment* which, as D'Cotta J recognized, would have to be made *by deed*; but *that would be an unusual and expensive way of effecting a change of tenant under an oral monthly tenancy*, when all that was needed was a surrender by Lee Siew Pan of his monthly tenancy to take effect on 31 December 1953 when he retired from the partnership (or at the end of any month thereafter) and the grant by the owner of the freehold, Chin Hwa Hin, of a fresh oral monthly tenancy to the remaining three partners in the firm, the personal appellants. (Emphasis added.)

For all these reasons, the appeal is allowed with costs to the appellants, here and below. The security for costs is to be paid out to the appellants' solicitors.

Appeal allowed.

Solicitors: G *Raman & Partners; Kirpal Singh & Co.*

Reported by *Teoh Ai Lin*

Re EG Tan & Co (Pte); Wong Tui San & Ors v Chase Manhattan Bank NA

HIGH COURT (SINGAPORE) — COMPANIES WINDING UP NO 212 OF 1986
LAI KEW CHAI J
31 OCTOBER 1990

Companies and Corporations — Charges — Whether share memorandum created fixed or floating charge — Shares kept in designated safe on chargor's premises

Under an agreement entitled Share Memorandum ('the share memorandum') between EG Tan ('the company'), a firm of stockbrokers, and the respondents, a bank that had extended to the company banking facilities, the company agreed to deposit in a designated safe shares as security. Any movement of share certificates in and out of the designated safe would be recorded. The safe was installed in the company's premises and marked with the respondents' name. The applicants as liquidators of the company were seeking declarations from the court that the respondents had no interest in the shares other than as unsecured creditors of the company, that the relevant share memorandum created a floating charge over the shares and that this charge was void for non-registration under the Companies Act (Cap 50, 1990 Ed).

Held, allowing the applicants' application:

(1) By cl 1 of the share memorandum, the company had charged the shares deposited or to be deposited and any substituted shares as continuing security for the banking facilities granted by the respondents. It was clear that the rights which attach to the shares or choses in action and not mere share scrips as such, are to be charged by way of security to the respondents. As such there was no intention to create a pledge over them.

(2) As far as the shares kept in the designated safe were concerned, the company was not put out of them and was free or would have been free to deal with them. They could have given good title over them to any bona fide purchaser provided such disposal was carried out in the ordinary course of business. All the characteristics of a floating charge were therefore present here.

Cases referred to

1 *Re Lin Securities Pte* [1988] 2 MLJ 137 (folld)
2 *Re City Securities Pte* [1990] 2 MLJ 257 (folld)
3 *Re Panama, New Zealand & Australian Royal Mail Co* (1870) 5 Ch App 318 (refd)
4 *Harrold* v *Plenty* [1901] 2 Ch 314 (refd)
5 *Stubbs* v *Slater* [1910] 1 Ch 632 (refd)
6 *The Colonial Bank* v *John Cady and John Charles Williams* (1890) 15 App Cas 267 (refd)
7 *Carter* v *Wake* (1877) 4 Ch D 605 (refd)
8 *Wrightson* v *McArthur and Hutchisons (1919) Ltd* [1921] 2 KB 807 (refd)
9 *Hilton* v *Tucker* (1888) 39 Ch D 669 (refd)
10 *Askrigg Pty Ltd* v *Student Guild of the Curtin University of Technology* [1990] 1 ACSR 40 (refd)

Timothy Lloyds QC (*Susan Kong* with him) for the applicants.

JM Chadwick QC (*Eugene Lim* with him) for the respondents.

Cur Adv Vult

Lai Kew Chai J: This case arose out of the financing of a firm of stock and share brokers which dealt with stocks and shares for their own account. The question is whether the shares and transfer forms were pledged or charged under a floating charge, seeing that the arrangements were made pursuant to a share memorandum and where shares and transfer forms were kept in a designated safe to which both the firm of brokers and their bankers each held a delocking key. The applicants as joint and several liquidators of EG Tan & Co (Pte) (hereinafter referred to as 'the company') are seeking from this court the following declaratory reliefs against the respondents:

(a) that the respondents have no interest at all other than as unsecured creditors of the company in relation to the shares listed in exh 'QSB 6' in the affidavit of Quek Soo Beng and detailed by way of an amendment on pp 6 to 8 of the schedule to the Amended Summons-in-Chambers No 7967 of 1987; and

(b) that the relevant share memorandum had created a floating charge over the other shares listed in the said schedule and set out in exh 'QSB 5' of the affidavit of Quek Soo Beng and that the floating charge is void for want of registration under the Companies Act (Cap 50, 1990 Ed) ('the Act').

The respondents are owed $19,393,283.11 by the company in connection with banking facilities extended by the respondents to the company prior to its liquidation. They claim security in respect of that indebtedness by way of a common law pledge over the share certificates and transfer forms held in the designated safe at the company's premises at close of business on 27 February 1986. Such share certificates are those listed in the company's letter dated 27 February 1986, a copy of which is exhibited as 'QSB 5' in the affidavit dated 9 February 1989 of Quek Soo Beng, a bank officer of the respondents. If the respondents' claim of a pledge over the share certificates and the transfer forms, as such and as pieces of paper as distinct from the rights and interest attaching to those shares, is right, it necessarily follows that the applicants as liquidators would not be able to marshal in and convert into cash the rights and interest in those shares for the purposes of the winding up and liquidation of the company. The shares in question would be dealt with outside the liquidation of the company.

I now set out the banking relationship and practices between the company and the respondents in connection with the financing of the company's dealing in marketable shares. In June 1978, the respondents granted the company banking facilities up to $5m which were secured by the physical deposit of share certificates and blank transfer forms at the respondents' premises. Until September 1982, the deposit of the share certificates was on the terms set out in three memoranda of deposit signed by the company on 27 June 1978, 20 November 1978 and 27 February 1979. Each such memorandum of deposit, which was substantially in the respondents' usual form, created a charge over the shares and blank transfers which were or would be deposited with the respondents. The charges created under the three memoranda of deposit were registered under the Act and except that their reference is by way of background nothing in this case turns on those memoranda nor the fact of the registration of the charges created thereunder.

The banking facilities were implemented as follows. The company, which was a company of stock and share brokers, in the course of its business had bought and sold shares for its own account. The company would also buy shares which were then charged to and physically delivered into the possession of the respondents. These shares were sold and new shares were bought by the company. In practice, the respondents would release shares to the company in exchange for the deposit of new shares of the type and value acceptable to them. In practice, such exchanges had taken place between authorized personnel from both sides on several occasions in a day, with the company's officers manually taking shares to the respondents' premises to exchange. The process became more and more burdensome as the company's dealing of shares for its own account increased. In or about November 1981, the company approached the respondents to vary the security arrangements. On 6 July 1982, the respondents wrote to the company in the following terms:

> We are pleased to confirm the availability of the following credit facilities to your fine company subject to the undermentioned terms of conditions and satisfactory documentation.
>
> S$30,000,000: For overdrafts, time loans and bills discounting/acceptance.
>
> Within which S$1,000,000: For issuance of bankers guarantee to the Singapore Stock Exchange on behalf of remisiers.
>
> Pricing: (1) Chase Manhattan Bank Singapore Prime + 1% for overdrafts.
> (2) Best effort basis for others.
>
> Security: (1) Pledge of marketable shares acceptable to the bank.
> (2) Any other collateral as may be mutually agreed upon by your company and the bank from time to time.
>
> Conditions: (1) A minimum of 50% value of the pledged shares are to be kept within the bank's premises and the balance in your office premises.
> (2) Actual outstandings, net of any cash collateral, should not exceed 90% of

the total market value of all shares pledged.

(3) For the pledged shares to be kept at your premises, you are to:

(a) provide an identifiable and demarcated safe in which these pledged shares will be stored daily. Access to this storage place should be made available to the bank and the bank will have the appropriate delocking devices to exercise this right.

(b) provide a daily listing of the shares with marked-to-market values. This listing is to be delivered to the bank by the following day.

(c) allow the bank to spot check and compare the listings against the actual physical shares stored in the designated safe.

(4) The company will provide the bank with its financial statements on a semi-annual basis within 90 days of closing date.

Guarantee: Joint and several guarantee for S$30,000,000 from Mr and Mrs Tan Eng Ghee.

The above interest rate shall be applicable to the relevant outstandings, subject to adjustment from time to time depending on market conditions relating to funding operations of our branches.

You will understand, of course, that the availability of these facilities depends on the conditions and usual credit factors remaining unchanged and further to the bank's right to review, suspend and withdraw the aforesaid facilities. The acceptance and compliance with the terms and conditions abovestated shall not impose on the bank any obligation to make any advance or to grant all or any facility.

Kindly sign and return the enclosed copy of this letter to signify your acceptance of the offer.

In view of our revised arrangement for the partial storing of pledged shares at your office premises, our lawyers have revised our standard share memorandum, a copy of which you have previously executed, to incorporate the new storing arrangement. You will note that the main text of the share memorandum has been kept unchanged. I am enclosing a draft share memorandum (revised) for your perusal and a copy of our standard share memorandum for comparison purposes. Please let me know as soon as possible of your concurrence to the revised draft and I will send the original to you for execution. Our lawyers have advised that this would not have to be registered with the Registry of Companies.

The company signified its acceptance of the terms and conditions at the bottom of the letter. The share memorandum was executed by the company on or about 26 August 1982.

The effect in law of the share memorandum is crucial. I therefore set out the relevant terms. It is in the form of a memorandum from the company to the respondents. It has altogether 19 clauses, the last of which provides that the governing law is the law of Singapore. The relevant terms are as follows:

1 We, EG Tan & Co (Pte) borrowers of Suite 801 Ocean Building, Collyer Quay, Singapore 0101 have deposited or will deposit with you the securities and hereby charge them to you together with any substituted securities as a continuing security for:

(1) the payment and satisfaction on demand of all money and liabilities absolute or contingent which are now or at any time hereafter may be due owing or incurred from or by us to you ...

(2) the payment to (you) on demand of all money and liabilities whether certain or contingent, now or hereafter owing or incurred ... by EG Tan & Co (Pte) ... on any current or other account or in any manner whatever whether as principal or surety and whether alone or jointly with any other person and in whatever name style or firm ...

2 The charge hereby created shall affect and the securities subject hereto shall include all dividends or interest paid or payable after the date hereof on any such securities and all stocks shares (and the dividends or interest thereon) rights moneys or property accruing or offered at any time by way of redemption bonus preference option or otherwise to or in respect of any securities hereby charged.

3 If we make default in paying, further securing or satisfying to you on demand any money or liability hereby secured you may without further notice sell or dispose of any securities subject hereto or any part thereof or any substituted securities in such manner and for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit and you may apply the proceeds of sale in or towards discharge of the costs incurred therein and of the money or liabilities hereby secured and the residue shall be paid to us on our order ...

4 We undertake for ourselves:

(i) that all such securities stocks and shares that are held in your favour and not deposited with the bank shall be specifically kept in a separate safe in our premises and that you shall be given the delocking devices to the said safe;

(ii) that we shall permit you at all times the right of access to our premises to take and transfer all such securities stocks and shares from the said safe;

(iii) that we shall provide you with a daily up-to-date list of all such securities stocks and shares kept in the said safe and to permit you at all times the right of access to our premises to inspect and check all such securities stocks and shares in the said safe and to make record thereof;

(iv) that all such securities stocks and shares so pledged to you shall be kept fully insured by us against loss or damage from whatsoever cause with insurance companies acceptable to you and that claims under the policy or policies shall be payable to you.

5 Any dividends interest or other payments which may be received or receivable by the bank in respect of any securities hereby charged may be retained by it and held in suspense and if the customer shall fail to pay further secure or satisfy to the bank on demand any money or liability

hereby secured they may be applied by it as though they were proceeds of sale hereunder and the bank may without further notice complete and register any transfers and sell or dispose of the securities hereby charged or any of them in such manner and for such consideration (whether payable or deliverable immediately or by instalments) as it may think fit and may apply the proceeds of sale in or towards discharge of the costs incurred therein and of the money and liabilities hereby secured, and shall pay the residue to us on our order.

6 We undertake for ourselves and our successors in title in respect of securities subject hereto from time to time to execute and sign all transfers powers of attorney and other documents which the bank may require for perfecting its title to the securities hereby charged or for vesting or enabling it to vest the same in itself or its nominees or in any purchaser.

7 The bank or its nominees may exercise at its or their discretion (in our names or otherwise at any time whether before or after the power of sale hereunder arisen and without any further consent or authority on our part) in respect of any of the securities hereby charged any voting rights and all the powers given to trustees by section 14(4) and (5) of the Trustees Act (Cap 40) in respect of securities or property subject to a trust and any power or right which may be exercised by the person or persons in whose name or names the securities are registered under the terms thereof or otherwise.

8 Without prejudice to the rights and obligations hereby created any dividends interest or other moneys hereby charged which may be received by us after the power of sale hereunder has arisen shall be held in trust for the bank and paid over to it on demand.

9 The security hereby created shall be a continuing one until receipt by the bank of the notice in writing to determine the same and notwithstanding any change in the name style or constitution of the customer.

I shall now narrate the events following the share memorandum. At a meeting on 8 September 1982 between officials of the respondents and representatives of the company, it was agreed that any movement of share certificates in and out of the designated safe would 'be recorded by pen on the typewritten list of the preceding day end ...' and that the company would 'ensure that at all times sufficient shares (were) kept in the safe to comply with the agreed financing margin'. The safe was subsequently installed in the company's premises. It was marked with the respondents' name and designated especially for their use. Parties thereafter operated the new arrangements.

I should mention that the arrangements were varied in two minor respects. By a letter dated 3 April 1984 the respondents confirmed their agreement to increase the credit limit to $50m upon substantially the same terms but they expressly reserved the right '... to transfer all shares stored in the designated safe to (their) premises at any point in time ...'. Secondly, by a letter dated 31 August 1984 the requirement that certificates comprising not more than one half in value of the respondents' security might be kept in the designated safe at the company's premises was varied to the intent that certificates might be kept in the safe as security for the first $30m of outstanding indebtedness to the respondents.

The applicants in para 14 of the affidavit filed on their behalf set out their understanding of the arrangements between the company and the respondents. They commented that '(t)he company was allowed at any time to remove the shares which it placed in the safe ... without prior consultation with the respondents'. It was pointed out by the respondents and I accept that the company was not allowed to remove share certificates from the designated safe except during business hours, and then only subject to the conditions (i) either that the value of certificates remaining should cover the outstanding indebtedness to the respondents and the agreed margin or that fresh certificates of sufficient value to provide that cover were immediately placed in the safe and (ii) that all movements of certificates into or out of the designated safe were recorded contemporaneously. It was also agreed that the company would ensure that at all times sufficient shares were kept in the safe to comply with the agreed financing margin, much like the intention of the parties under the previous arrangements when the certificates were kept at the banking premises of the respondents.

The share counting of the certificates in the designated safe, which usually lasted about one and a half hours, was carried out at the company's premises usually by two or more authorized officers from the respondents 'Bank's Custody Department'. It was carried out at random and without notice. The safe was opened in the presence of authorized personnel from both the respondents and the company. The keys and combination were held by them. In sum, the respondents had uncontrolled access to the contents of the designated safe and the company also could have access to them but on the terms already set out and, in that capacity, it is contended on behalf of the respondents that the company was the bailee of the delocking key which the company could use only strictly upon the terms of the bailment.

The events of 27 February 1986 must now be referred to. At this time, the financial crisis affecting stockbrokers since the last quarter of the previous year had reached a stage when their bankers were freed from a moratorium which had stayed their hands and bankers began taking action against their stockbroking clients who had defaulted. Inevitably, the respondents sent their officers to be present at the company's premises to monitor the movements of shares in and out of the safe. All contractual arrangements on the part of the company were complied with. The share counting proceeded late into the night. In the result, a list of shares was

settled and agreed between representatives of the company and the respondents. They were the shares listed in exh 'QSB 5' referred to at the beginning of this judgment. The company in compliance with its obligation to cover the margin put into the safe additional shares. These additional shares were listed in the exh 'QSB 6' which is also referred to at the beginning of this judgment. I should mention that no creditor of the company other than the respondents have claimed any security interest over any of the shares comprised in the certificates held in the designated safe.

On 27 February 1986, a Mareva injunction was granted against the company in an action in the High Court which was instituted by another bank. On the following day the respondents went to the company and sought to remove the certificates from the safe but the company did not allow them to do so in view of the injunction. On 1 March 1986, the respondents obtained an ex parte order in Suit 2111 of 1986 which required the company to allow them to remove the certificates from the safe, but this order was later suspended before it could be enforced. That suit was later discontinued.

On 13 March 1986, provisional liquidators were appointed for the company. On 2 July 1986, the respondents commenced Suit 3971 of 1986 against the company claiming (inter alia) a declaration of their rights of access to all such securities, stocks and shares deposited by the company in their favour and held in the designated safe. On 3 December 1986, the respondents obtained summary judgment and costs against the company but the company was allowed to defend the respondents' claim for the declarations sought in Suit 3971 of 1986.

Earlier, on 1 August 1986, a winding-up order was made against the company.

The applicants as liquidators of the company are seeking in these winding-up proceedings the reliefs I had mentioned earlier. On the other hand, the respondents are seeking (i) a declaration that the share certificates and transfer forms held in the designated safe at the company's premises at close of business on 27 February 1986 were pledged to them to secure the company's indebtedness; (ii) an order that the applicants deliver to the respondents such of the said share certificates and transfer forms as have not been disposed of; and (iii) an order for an account and payment of the proceeds of such of the shares comprised in the said share certificates as might have been sold by the liquidators.

The first question is simply but most importantly in this case one of construction of the share memorandum as to the intention of the parties in relation to the respondents' security in the shares deposited and to be deposited on and as from 26 August 1982. This task has to be undertaken by first and foremost ascertaining the ordinary meaning of the words used in the share memorandum against the 'factual matrix' or background of the transactions and eschewing in the process of construction matters dehors the share memorandum such as the subjective wishes or intent of either party before the agreement was signed or their subsequent conduct: see *Re Lin Securities (Pte)*[1] at pp 137 and 143E-144G.

Reading the share memorandum as a whole, I conclude that parties had intended to secure the banking facilities by fixed and floating charges (in relation to shares in the respondents' own banking premises and those to be kept in the safe respectively) subject to the terms and conditions set out in the share memorandum and that there was no intention to create a pledge over the shares and transfer forms as pieces of paper or documents which were to be kept in the designated safe and which arose only under cl 4 and the act of storing the same in the safe quite independent of and not subject to the terms of the share memorandum. The creation by a stock-brokering borrower and acceptance by a bank of a pledge over shares and transfer forms as documents, without any reference to the rights attaching thereto, is normally unusual in such a financing transaction. The creation of a pledge over shares and transfer forms under only cl 4 of the share memorandum by a very strained process of imaginative interpretation, with the rest of the memorandum (save the governing law and final clause thereof) having nothing to do with the pledge, is even more unlikely. In my opinion, by cl 1 of the share memorandum, which is the only operative clause so far as the creation of any security interest is concerned, the company had thereby charged the shares deposited or to be deposited and any substituted shares as continuing security for the banking facilities granted by the respondents. In the context, 'the securities' in that clause included the shares physically deposited with the respondents as well as those to be kept at the designated safe. Throughout the memorandum, it is clear to me that the rights which attach to the shares or the choses in action, and not mere share scrips as such, are to be charged by way of security to the respondents in respect of the banking facilities. In my view, cl 4 of the memorandum is not free-standing by itself in the sense that it does not create and does not purport to create any security interest or a pledge. At any rate, the most telling question which Mr Lloyds had raised and which the respondents are unable to give any reasonable answer is: what is the common law pledge over the share documents as such security for? In the context of a firm of stockbrokers seeking financing over marketable shares, which are its stock-in-trade, it would be in my view rather unusual for a bank to be content to

accept the pledge of the paper relating to the shares and not security over the rights or choses in action attaching thereto. The use of the words 'so pledged' in cl 4(iv) in the memorandum is not sufficient to displace the clear intention of the parties as expressed in cl 1 that all shares deposited and would be deposited and substituted shares would be charged to the respondents as security for the banking facilities. I accept the submission of Mr Lloyds that cl 4 deals solely with the administrative arrangements in consequence of the new arrangements.

I should consider the submissions of Mr Chadwick on the construction point. He said that there were three categories of shares which were the subject of the charge referred to in the memorandum, viz the shares already deposited with the respondents by 26 August 1982; secondly, those which were to be deposited thereafter with the respondents and, thirdly, those shares to be substituted for either of the first two categories. He went on to say that every reference in the memorandum to the securities thereby 'charged' would cover securities in any of the three categories. Referring to the opening words of cl 4(i) — 'All such securities, stocks and shares that are held in your favour and not deposited with the bank, ...' — he submitted that those words distinguished the shares deposited or to be deposited in the banking premises of the respondents and those shares which were to be kept in the designated safe and that the former were charged under cl 1 whereas the latter were pledged under cl 4 of the memorandum. I accept that a distinction between the shares was drawn but it was drawn not for the purpose of creating the nature of the security interest in favour of the respondents but for the administrative purpose set out in that paragraph. He mentioned the significance of the use of the word 'pledged' in cl 4(iv), although he did not want to press the point too far given the looseness of language in this field. In my view the meaning of the ordinary words in cl 1 of the memorandum has to be given its full effect: the substance is more important than a word here and there. Mr Chadwick then referred to the previous arrangements between the parties for the years between 1978 and 1982 where the charge of the shares deposited with the respondents were registered as a 'floating charge' since it was thought the company's ability to exchange the shares could conceivably make it a floating charge. Both Mr Lloyds and Mr Chadwick rather regarded shares deposited with and stored at the banking premises of the respondents were plainly under fixed charges. On that view, no registration of the charges would be necessary under the Act. Mr Chadwick further pointed out that clearly the parties wanted to alter the arrangements so as to separate into two packets, as it were, the shares which the company could trade in and those which were not to be traded in. The purpose was to avoid the need for officers of the company to have to go and swap the shares at the premises of the respondents. He also submitted that it was clear that both parties had intended to create a non-registrable fixed charge over shares deposited at the banking premises of the respondents and a non-registrable common law pledge over the shares in the safe. According to him that was clear from the letter of 6 July 1982 written by the respondents and confirmed by the company.

I have to look at the memorandum and on the face of it the intention is not to create and accept a common law pledge over the shares in the safe. I should say in parenthesis that the question whether it was in fact the common intention of both parties to create and accept only a common law pledge in respect of the shares in the safe is not before me. My task is to ascertain their intention as expressed in the memorandum.

In this case, we are not concerned with any shares kept in the respondents' own premises. There were none as the banking facilities used at the material time did not exceed $30m. If there had been, they would have been under fixed charges for which registration is not required under the Act.

We are here concerned only with the scrips and transfer forms kept in the designated safe. In my view the essential features in this case are indistinguishable from those in both *Re Lin Securities (Pte)*[1] and *Re City Securities Pte*.[2] Both cases dealt with commercial contexts more or less similar to those obtaining in this case save and except that both parties here held a delocking key each to the designated safe. The company by the memorandum had created an equitable charge over the shares in the safe by way of security for the respondents. Although the shares were kept in the safe, the equitable charge did not attach to any specific share. Those shares could be swapped or substituted by the company without any prior consultation or permission of the respondents so long as they complied with the conditions under which the substitution could take place. By itself, the arrangements made under cl 4 of the memorandum in my opinion unfortunately did not make any difference in the distinction. The two cases I mentioned dealt with the nature of a floating charge which was created by the Court of Chancery in the 1860s. *Re Panama, New Zealand & Australia Royal Mail Co*[3] is generally regarded as the first case where the concept of a floating charge was expressly recognized by the Court of Appeal in Chancery. In *Re Lin Securities (Pte)*[1] and *Re City Securities Pte*,[2] Chao Hick Tin JC having, inter alia, construed the security documentation before him applied the three main characteristics of a floating charge, namely:

(a) it is a charge on a class of assets of a company both present and future;

(b) those assets are of a kind which, in the ordinary course of the business of a company, would be changing from time to time; and

(c) it is contemplated that, until some step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way, and dispose of all or any of those assets in the ordinary course of business.

All these features are clearly present so far as the shares kept in the designated safe are concerned. The company was not 'put out of them' and was free or would have been free to deal with them. They could have given good title over them to any bona fide purchaser provided such disposal was carried out in the ordinary course of their business. If the respondents had kept any share in their own premises, thereby putting the company out of them, or if they had removed the shares to their own premises in exercise of their rights, they would have converted the floating charge into a fixed charge. In those circumstances, registration of a floating charge would not have arisen and there would be no question of any invalidation of the charge.

My construction of the share memorandum is sufficient to justify an order in terms of the application of the applicants. But two further issues had been canvassed before me and I should deal with them, though somewhat briefly.

The first issue was argued on the basis that my construction was wrong and further has to be predicated on two elements, namely, (i) cl 4 are the only terms relating to and governing the pledge; and (ii) there is the deposit of the shares by the company in the designated safe. I should also set out the common case between learned counsel so that I need not traverse non-controversial ground. Both learned counsel agreed that there can be no common law pledge over the interest attaching to shares. They also agreed that there can be a common law pledge over the share scrips as paper in their documentary nature and, as if, they are goods. They also agreed that there can be a pledge over bearer securities for the simple reason that they or more accurately the possession in them, like that in goods, pass by delivery of the physical documents. The question concerns the nature of security interest which arises or is created by the deposit by a borrower with a lender of a marketable share certificate and a blank transfer form duly completed by the registered owner of the share. As far as I know this vexed question has never been finally settled. However, the well-known cases of *Harold* v *Plenty*[4] and *Stubbs* v *Slater*[5] demonstrated the courts' readiness to infer an agreement on the part of the depositor to make an equitable mortgage. Courts pragmatically and with a great deal of commercial and common sense thought that it could not be that the deposit was merely to give the depositee the power to sell only the paper which does not confer any right to the interest attaching to the shares. It appears therefore that courts will more readily infer from a deposit of marketable shares an agreement to create an equitable mortgage. This readiness has no bearing in this case where the terms of the share memorandum and the context has to be considered. I should add, however, that if it is clear beyond any peradventure that what the documentation shows is an evident intention to create a pledge over marketable shares, there is nothing in law against its creation, even if its 'negative' value may be questionable. In *Colonial Bank* v *Cady*,[6] the speeches of Lord Halsbury and others recognized the deposit of certificates as a pledge. *Carter* v *Wake*[7] involved the deposit of company bonds which were ordered to be sold on the basis that there was a pledge of them.

The next question, which is rather more difficult, is one of mixed fact and law. It was debated on the basis that a pledge of the shares in the safe was intended but the implementation had fallen short of the requirements of a pledge at law. Mr Lloyds contended that the respondents on the facts did not have the possession of the scrips in the safe necessary to constitute a pledge. Specifically, he submitted (and if I may summarize his arguments) that the company had not delivered the shares to the respondents in the sense that the company, in having a key to the safe, was not 'put out' of reach of the shares. He contended that the arrangements did not 'pass the full control' of the contents of the safe to the respondents within the concepts of control as elaborated in *Wrightson* v *McArthur*[8] at pp 816-818 and *Hilton* v *Tucker*.[9] Mr Chadwick, on the other hand, said that the company's access to the shares by the use of the key in its possession is immaterial because the key was held on bailment subject to terms.

I find very helpful judicial pronouncements on the element of possession required for a pledge in the case of *Askrigg Pty Ltd* v *Student Guild of the Curtin University of Technology*.[10] The question in that case was whether a number of investors/depositors had a valid security over certain bills of exchange. It would be if there was a pledge which, in turn, depended on whether they had in law possession of the negotiable instruments. The company traded in bills. It took deposits of money from investors to finance that trading, for which they issued acknowledgements which stated, inter alia, that one or more bills of exchange which were particularized and which were endorsed by the company as well, were '... pledged to secure your deposit. The securities are held by us on your behalf.' As to the arrangements, the practice was that the company kept the relevant bills of exchange in a security packet bearing the name of the investor which was held in a security box. The company

from time to time 'switched' by way of substitution the bills of exchange. The company would inform the investors of such swaps of the negotiable instruments, giving particulars of the new bills of exchange. The liquidators of the company unsuccessfully argued that a floating charge was created.

In relation to the element of possession, Cohen J stated at pp 44-45 as follows:

> A necessary element of a pledge is possession and this requires delivery to the pledgee. That need not be actual or physical delivery but permits of constructive delivery. This may be brought about by the delivery of the means of obtaining possession, such as the handing over of a key to premises where goods are stored or by attornment, that is, where there is an acknowledgement that the right to possession to the goods has passed. Thus, if there is an agreement between the parties whereby the possession of the pledger on his own account is changed to possession as bailee for the pledgee, that will be sufficient to amount to possession. It is said that such an agreement operates as a delivery of the goods to the pledgee and a re-delivery of the goods by the pledgee to the pledger as bailee for the purposes mentioned in the agreement. A mere book entry, it is said, cannot have this effect. See the speech of Lord Parker in *Dublin City Distillery Ltd* v *Doherty* [1914] AC 823 at 852.
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> In the same case (at p 843) Lord Atkinson pointed out that a contract to pledge a specific chattel, even though the money be advanced on the faith of it, is not in itself sufficient to pass any special property in the chattel to a pledgee. He dealt then with constructive delivery and drew heavily on cases relating to a change of possession in the sale of goods.
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> Constructive delivery of goods was also considered by the High Court in *Gamer's Motor Centre (Newcastle) Pty Ltd* v *Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236. At p 244 Mason CJ quoted part of what had been said by Chalmers *Sales of Goods Act 1893* (18th Ed) Butterworths, 1981, when he stated that constructive delivery occurs when it is effected without any change in the actual possession of the thing delivered, as in the case of delivery by attornment or symbolic delivery. He then pointed out that delivery by attornment could take place in three ways, the first of which was when the seller is in possession of the goods but after the sale he attorns to the buyer but continues to hold the goods as bailee. The other two cases are where the goods are already in the possession of the buyer and where they are in the possession of a third person. Reference was also made to the general principle that the right to possession may be transferred by agreement without the physical possession changing.
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> Although the court in *Gamer's* case was concerned with the effect of statutory provisions, it was said that the principles at common law were still applicable. Those principles had been accepted by the High Court in *Akron Tyre Co Pty Ltd* v *Kittson* (1951) 82 CLR 477. Williams and Kitto JJ noted that it was well established that constructive delivery sufficient to pass the title in chattels may be effected by a change in the character of an uninterrupted custody. This was referred to again by Williams J in *Minister for Supply and Development* v *Servicemen's Co-operative Joinery Manufacturers Ltd* (1951) 82 CLR 621.
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> Apart from the question of delivery as an essential part of a pledge, it is also necessary that the party in whose hands the goods are placed has a right to sell them upon default by the pledger in order to satisfy the debt. For that purpose the control of the goods must remain with the pledgee.

The requirement of delivery and the amount of control by the investors over the bills of exchange in that case are more or less the same as those obtaining in the case before me. Accordingly, I am satisfied that on this issue the respondents had sufficient control and therefore possession if there was intended a pledge at law.

Accordingly, there would be an order in terms of the declaratory reliefs sought by the applicants. The respondents are to pay the applicants' costs to be taxed.

Application allowed.

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Reported by *Terence Tan Bian Chye*